

**STATE OF MICHIGAN  
DEPARTMENT OF NATURAL RESOURCES AND ENVIRONMENT  
WATER BUREAU**

In the matter of:

ACO-000017

Date Entered: 7.20.2010

Birds Eye Foods, LLC.  
100 Sherman Street  
Fennville, Michigan 49408

---

**ADMINISTRATIVE CONSENT ORDER**

This document results from allegations by the Department of Natural Resources and Environment (DNRE), Water Bureau (WB). The DNRE alleges Birds Eye Foods, LLC (BEF) located at 100 Sherman Street, Fennville, Michigan in Allegan County, is in violation of Part 31, Water Resources Protection, of the Natural Resources and Environmental Protection Act, 1994 PA 451, as amended (NREPA), MCL 324.3101 et seq. BEF is a person, as defined by Section 301 of the NREPA, and is registered with the Michigan Department of Labor and Economic Growth as able to conduct business in the State of Michigan as a foreign profit corporation under Identification No. 646836. BEF and the DNRE agree to resolve the alleged violations set forth herein without any legal determination of a violation through entry of an Administrative Consent Order (Consent Order).

**I. STIPULATIONS**

BEF and the DNRE stipulate as follows:

- 1.1 The NREPA MCL 324.101 et seq., is an act that controls pollution to protect the environment and natural resources in the state.
- 1.2 Pollution Control, Part 31, Water Resources Protection, of the NREPA (Part 31), MCL 324.3101 et seq., and the rules promulgated pursuant thereto, provides for the protection, conservation, and the control of pollution of the water resources of the state.

- 1.3 The DNRE is authorized by Section 3112(4) of Part 31 of the NREPA to enter orders requiring persons to abate pollution, and the director of the DNRE may delegate this authority to a designee under Section 301(b) of the NREPA, MCL 324.301(b).
- 1.4 The DNRE and the Department of Attorney General are authorized under Section 20134 of Part 201 of the NREPA to enter orders in settlement of potential liability under Part 201, and requiring remedial action by potentially responsible parties. This Consent Order and the response activities required herein are issued pursuant to such authority under Part 201.
- 1.5 BEF consents to the issuance and entry of this Consent Order and stipulates that the entry of this Consent Order constitutes a final order of the DNRE and is enforceable as such under Section 3112(4) of Part 31 and Section and 20134 of Part 201. BEF agrees not to contest the issuance of this Consent Order, and that the resolution of this matter by the entry of this Consent Order is appropriate and acceptable. It is also agreed that this Consent Order shall become effective on the date it is signed by the Director of the DNRE.
- 1.6 BEF and the DNRE agree that the signing of this Consent Order is for settlement purposes only and does not constitute an admission by BEF that the law has been violated or a finding of fact or law that the law has been violated.
- 1.7 The Signatory to this Consent Order on behalf of BEF agrees and attests that he is fully authorized to assure that BEF will comply with all requirements under this Consent Order.
- 1.8 BEF shall achieve compliance with the aforementioned regulations in accordance with the requirements contained in Section III, Compliance Program, of this Consent Order.

## **II. DNRE FINDINGS**

- 2.1 On January 28, 1994, Comstock Michigan Fruit Cannery, a division of Curtice Burns Foods, Inc., was issued Groundwater Discharge Permit No. M00685 (Permit) authorizing the discharge of food processing wastewater to the groundwater. Curtice Burns Foods, Inc. submitted a timely initial application for reissuance of the Permit. On July 25, 2000,

Agrilink Foods, Inc., a successor of Curtice Burns Foods, Inc. submitted a second application for reissuance of the Permit. BEF succeeded Agrilink Foods, Inc. on March 3, 2003. BEF and its predecessors have discharged under the authorization contained in the Permit which has remained in full force and effect since its issuance.

- 2.2 On December 16, 2004, staff of the DNRE issued Notice Letter NL-001044 to BEF citing violations of the Permit. The cited violations included exceedances of effluent limitations for pH and sodium. The Notice Letter further stated that groundwater monitoring data indicated that BEF's lagoon and/or spray irrigation system had caused groundwater contamination in excess of generic residential clean up criteria established under Part 201, Environmental Remediation, of the NREPA, and directed BEF to prepare and submit to the DNRE a Remedial Investigation/Feasibility Study.
- 2.3 On June 23, 2008, staff of the DNRE issued Violation Notice VN-003474 to BEF. The Violation Notice identified additional exceedances of Permit effluent limitations for sodium, chloride, total inorganic nitrogen and pH. The Violation Notice also noted elevated levels of dissolved iron and total inorganic nitrogen in BEF's groundwater monitor wells in excess of groundwater discharge standards established under R 323.2222, and/or the Part 201 generic residential clean up criteria. The Violation Notice further stated that BEF's discharge is in violation of Rule 2204(2)(f) which prohibits a person's discharge from creating a "Facility" as defined by Part 201.
- 2.4 Foth Infrastructure & Environment, LLC, on behalf of BEF, has submitted the following reports in response the DNRE's allegations specified in paragraphs 2.2 and 2.3:
  - a. Letter re: Determination of Background Quality, submitted August 1, 2005
  - b. Letter re: Residential Well Testing Data, submitted September 28, 2005
  - c. Letter re: Work Plan for the Remedial Investigation of the Suspected Iron Plume at the Spray Irrigation Fields, submitted December 8, 2005
  - d. Results of the Remedial Investigation of Suspected Iron Plume at the Spray Irrigation Fields, submitted on June 5, 2006.

- e. Letter re: Work Plan for Additional Remedial Investigation of the Suspected Groundwater Plume, submitted February 28, 2007
  - f. Letter re: Results of May 2007 and Interim Response, submitted July 19, 2007
  - g. Results of Additional Remedial Investigation of the Suspected Groundwater Plume, submitted on August 21, 2007
  - h. Letter re: Additional Remedial Investigation, submitted October 10, 2007
- 
- i. Letter/Report re: Work Plan for Additional Remedial Investigation of the Alleged Groundwater Plume, submitted November 13, 2007
  - j. Letter re: Private Water Supply Well Sampling Plan, submitted February 25, 2009
  - k. Letter re: Remedial Investigation Report, submitted March 18, 2009
  - l. Report re: Hydrologic Assessment for Arsenic Report for – Occurrences of Arsenic in Groundwater, submitted June 25, 2009
  - m. Remedial Investigation Interim Report submitted December 1, 2009
  - n. Data Evaluation Report submitted February 17, 2010
  - o. Additional Groundwater Monitoring Well Installation and Groundwater Sampling Results submitted March 22, 2010
- 2.5 During the course of its investigation, BEF has asserted there are several potential sources or contributors, including natural background levels, of iron, manganese, arsenic, sodium and/or chloride concentrations found in groundwater upgradient, sidegradient and downgradient from BEF's spray fields.

### **III. COMPLIANCE PROGRAM**

IT IS THEREFORE AGREED AND ORDERED THAT BEF shall take the following actions:

#### 3.1 Performance Objectives

BEF shall perform all necessary response activities to comply with the requirements of Parts 31 and 201, including, but not limited to, the following response activities:

- a. BEF shall design and construct a new wastewater treatment system that will provide sufficient treatment to comply with a groundwater discharge permit issued in accordance with Part 31 and the Part 22, Groundwater Quality rules, as set forth in paragraph 3.2 of this Consent Order.
- b. BEF shall implement interim response activities set forth in paragraph 3.3 of this Consent Order to provide alternate water supplies, in accordance with R 299.5526(4), to locations downgradient of BEF's spray irrigation fields.
- c. BEF shall perform additional remedial investigations, as set forth in paragraph 3.4 of this Consent Order, to fully determine the nature and extent of contamination, in accordance with R 299.5528 and Section 20114 of Part 201.
- d. BEF shall perform remedial action as approved in a DNRE approved Remedial Action Plan (RAP) or Long Term Interim Response Action (LTIRA). The performance objectives of the RAP or LTIRA shall comply with the applicable provisions of Part 201 of the NREPA and its administrative rules, including R 299.5532, as set forth in paragraph 3.4 of this Consent Order.

#### 3.2 Wastewater Treatment

- a. On November 30, 2009 the DNRE issued an amended Certificate of Coverage under National Pollutant Discharge Elimination System (NPDES) General Permit No. MIG589000 to the city of Fennville to accommodate a discharge of process wastewater from the Birds Eye wastewater treatment system via the city's wastewater treatment system outfall to the Severens Drain. On

December 14, 2009, BEF submitted a groundwater discharge permit application requesting authorization to discharge process wastewater to the groundwater. In its application, BEF has proposed construction of a new wastewater treatment system. BEF will discharge to the city of Fennville wastewater treatment system during the period authorized under the above referenced NPDES General Permit, and has proposed to discharge to the groundwater via spray irrigation during the growing season.

- b. By no later than October 1, 2010, BEF shall submit to the DNRE final design plans and specifications for the new wastewater treatment system.
- 
- c. By no later than October 1, 2011, BEF shall complete construction of the new wastewater treatment system in accordance with the final design plans and specifications.
  - d. By no later than November 1, 2011 BEF shall begin operating the new wastewater treatment system in full compliance with the terms and conditions of a valid groundwater discharge permit.

### 3.3 Interim Response (IR)

- a. BEF has supplied bottled water to the locations identified in Exhibit A with water supplies exceeding a residential health based drinking water value for one or more substances. BEF shall continue to provide bottled water to these locations until one of the following occurs:
  - (i) The location is connected to the city of Fennville municipal water supply system pursuant to this paragraph, or the owner of the location fails or refuses to execute an agreement with Fennville allowing the connection by the project completion date specified by Fennville.
  - (ii) The location receives a permanent alternate water supply pursuant to a RAP or LTIRA approved by the DNRE pursuant to paragraph 3.4 of this Consent Order.

- (iii) The final Remedial Investigation (RI) report approved by the DNRE pursuant to paragraph 3.4 of this Consent Order determines that the location is not within the "Facility" as defined by Part 201.
- b. BEF's obligation with regard to payment for residential hookups for those properties listed on Exhibit B shall be as follows:
  - (i). BEF shall pay to the City of Fennville an amount equal to the number of residences listed on Exhibit B that agree to be hooked up times the average cost per residence to do a hookup, as determined by the contract(s) to perform such work, subject to a grant funding adjustment and the minimum amount set forth below.
  - (ii). BEF shall pay a minimum of \$70,000 for hookups and/or operating costs to the City, notwithstanding whether grant funding would be sufficient to cover all or part of such costs.
  - (iii). If grant funding is sufficient to pay for some or all of the hookup costs for which BEF is obligated to pay under subparagraph (i) above, BEF's funding obligation shall be reduced by the amount of such available grant funding, but in no event shall BEF's obligation be reduced below the minimum payment set forth in subparagraph (ii) above.
  - (iv). In the event that grant funding plus the payment by BEF under subparagraph (i), above is not sufficient to fully pay for all hookup costs for all residents within the City's expanded water district, BEF's payment shall be used to pay for the full cost of hookups for those residences listed on Exhibit B that agree to hookup to the Fennville water system.

### 3.4 RI, Feasibility Study (FS), RAP and LTIRA

- a. Based on groundwater quality investigations identified in paragraph 2.4, BEF and the DNRE agree that BEF has reasonably identified the scope of the groundwater

contamination downgradient from BEF in the uppermost aquifer, as shown in Exhibit C. BEF and the DNRE agree that for the purposes of completing an RI in compliance with R 299.5528, additional investigations must occur in the area northeast of the BEF spray irrigation system as depicted on Exhibit C. This area is generally described as north of 124<sup>th</sup> Avenue and west of the Fennville-Billings Drain. Within 120 days of the effective date of this Consent Order, BEF shall submit to the DNRE for review and approval a work plan for a Phase 2 Remedial Investigation (Phase 2 RI) which shall occur in the area described above. The Phase 2 RI work plan shall comply with Section 20114 of Part 201 and R 299.5528, and shall include an implementation schedule.

- 
- b. The DNRE will approve, disapprove, or approve with specific modifications, the Phase 2 <sup>RI</sup>~~RI~~ in accordance with Section IV of this Consent Order. 
- c. Within 90 days after receipt of written approval of the Phase 2 RI, BEF shall submit to the DNRE for review and approval an RI Report summarizing the results of the RI. If BEF determines that additional investigations are needed to fully determine the nature and extent of contamination, the RI Report shall include a work plan for the additional investigations meeting the requirements of R 299.5528, and including an implementation schedule.
- d. The DNRE will approve, disapprove, or approve with specific modifications, the RI Report in accordance with Section IV of this Consent Order. If the DNRE disapproves the RI Report because it has determined that BEF has not fully determined the nature and extent of contamination, the DNRE will, in addition to the provisions of paragraph 4.3, provide BEF with the specific technical reasons, based on the available groundwater data, for its determination, and BEF shall conduct the additional investigations as set forth in the disapproval notice and in accordance with Section IV of this Consent Order, unless BEF prevails in a challenge of the DNRE's determination pursuant to Section 20137 of Part 201.
- e. In the event that the DNRE approves a RI Report that includes a work plan for additional investigations to fully determine the nature and extent of contamination,

BEF shall, within 60 days after completion of the work plan, submit an amended RI report in accordance with subparagraph c, above.

- f. Within 30 days after receipt of written approval of a final RI Report that fully identifies the nature and extent of the contamination, BEF shall submit to the DNRE for review and approval an FS. The FS shall comply with the provisions of R 299.5530.
  - g. The DNRE will approve, disapprove, or approve with specific modifications, the FS in accordance with Section IV of this Consent Order.
- 
- h. Within 90 days after receipt of written approval of the FS, BEF shall submit to the DNRE for review and approval, a RAP. The RAP shall comply with the applicable provisions of Part 201 of the NREPA and its administrative rules, including R 299.5532. The RAP shall include a schedule for implementation.
  - i. The DNRE will approve, disapprove, or approve with specified modifications, the RAP in accordance with Part 201 of the NREPA and Section IV of this Consent Order.
  - j. Upon receipt of written approval of the RAP, BEF shall implement the RAP in accordance with the schedule contained therein.
  - k. BEF may, as an alternative to submittal of a RAP, submit a LTIRA. The LTIRA shall be submitted within 90 days after receipt of written approval of the RI/FS Report. The LTIRA shall contain a schedule for implementation. The LTIRA shall comply with the following provisions of R 299.5532:
    - (i). Rule 532(4)
    - (ii) Rule 532(5)(a) & (c)
    - (iii) Rule 532 (6) through (10)
    - (iv) Rule 532(11)(a) through (b), and (d) through (n)

- (v) Rule 532(12) through (13)
- I. The DNRE will approve, disapprove, or approve with specified modifications, the LTIRA in accordance with Section IV of this Consent Order.
- m. Upon receipt of written approval of the LTIRA, BEF shall implement the LTIRA in accordance with the schedule contained therein.
- n. If a LTIRA is submitted, the deadline for RAP submittal specified in subparagraph h, above will be suspended until the LTIRA is either approved or disapproved by DNRE. If DNRE disapproves the LTIRA after BEF submits a revised LTIRA in accordance with paragraph 4.3 of this Consent Order, BEF shall submit a RAP within ninety days of such disapproval. If the LTIRA is approved by DNRE, the due date for a RAP shall be suspended as long as the following conditions are met:
  - (i) All of the components of the approved LTIRA are being implemented as described by the LTIRA and within the schedule presented in the LTIRA.
  - (ii) The remedy chosen in the LTIRA remains effective at protecting human health and the environment. If DNRE determines that the remedy is ineffective BEF may be required to modify the current response activity or to undertake additional investigative and/or response activities in accordance with Section 3.5 of this order.
- o. If the DNRE determines that the conditions set forth in subparagraph n above have not been met, it shall so notify BEF in writing and BEF shall submit the RAP by the date specified in the DNRE's notification.
- p. Following implementation of the LTIRA, BEF shall submit either a RAP to the DNRE for review and approval, or if site conditions have improved to the point where the site is in compliance with the applicable provisions of Part 201 of the NREPA and its administrative rules, including Rule 532 and Rule 705, BEF may submit a closure report in accordance with Rule 532(4).

### 3.5 Modification of a Response Plan

- a. If the DNRE determines that a modification to a response activity work plan is necessary to meet and maintain the applicable performance objectives specified in this Section, to comply with Part 201, or to meet any other requirement of this Consent Order, the DNRE may require that such modification be incorporated into a response activity work plan previously approved by the DNRE under this Consent Order. Said determination by DNRE shall be in writing and describe the basis for the modification. If extensive modifications are necessary, the DNRE may require BEF to develop and submit a new response activity work plan. BEF may request that the DNRE consider a modification to a response activity work plan by submitting such request for modification to the DNRE project coordinators, along with the proposed change in the response activity work plan and the justification for that change to the DNRE for review and approval. Any such request for modification by BEF must be forwarded to the DNRE at least thirty (30) days prior to the date that the performance of any affected response activity is due. Any work plan modifications or any new work plans shall be developed in accordance with the applicable requirements of this Section and shall be submitted to the DNRE for review and approval in accordance with the procedures set forth in Section IV (Approval of Submittals).
- b. Upon receipt of the DNRE's approval, BEF shall perform the response activities specified in a modified response activity work plan or a new work plan in accordance with the DNRE-approved implementation schedules.

### 3.6 Voidance and Nullification of the DNRE's Approval of a RAP

- a. Irrespective of the requirements of this Consent Order, if BEF allows a lapse of, or fails to comply with any provision of an approved RAP specified in MCL 324.20120(b)(3), the DNRE's approval of the RAP is void. If any of the conditions specified in Rule 520(11) or (12) occur, the DNRE's approval of the RAP is nullified.

- b. Within 30 days of BEF becoming aware of a lapse or failure to comply under subparagraph a, above, BEF shall submit to the DNRE for review and approval, either a written description of actions taken to correct the lapse or noncompliance, or a work plan describing actions proposed to be taken to correct the lapse or noncompliance. Upon receipt of the DNRE's approval, BEF shall implement any such work plan in accordance with its provisions.
  
- 3.7 BEF shall submit all reports, work plans, specifications, schedules, or any other writing required by this section to the Kalamazoo District Supervisor, WB, DNRE, 7953 Adobe Road, Kalamazoo, Michigan 49009-5026. The cover letter with each submittal shall identify the specific paragraph and requirement of this Consent Order that the submittal is intended to satisfy.
  
- 3.8 Based on groundwater sampling results collected to date from five DNRE approved upgradient groundwater monitoring wells, MW-27, MW-28, P-28, MW-30 and MW-31, DNRE has determined that the site-specific concentration of iron upgradient from the spray fields is 2.0 milligrams per liter, and this value shall be used as the clean up criteria pursuant to R 299.5707 unless modified as set forth in this paragraph. For future groundwater monitoring of upgradient groundwater conditions, DNRE has agreed that all of the samples from the above five monitoring wells, plus all of the samples from MW-43 (a new monitoring well to be installed within the area shown on the map attached as Exhibit D) shall be used to establish upgradient groundwater concentrations, as set forth below. DNRE will approve or disapprove in writing the use of MW-43 as one of the upgradient groundwater monitoring wells to be used in calculating upgradient iron concentration following completion of the well and the initial sampling from the well. Prior to installation of MW-43, BEF shall also submit to DNRE for approval the sampling protocol for sampling all monitoring wells and DNRE will approve, disapprove or modify such protocol in accordance with Section IV of this Consent Order.

If BEF wishes to demonstrate that a higher site-specific upgradient concentration should become the clean up criteria, BEF may submit a written report to the DNRE requesting approval of the revised upgradient concentration pursuant to R 299.5707. The report shall include the technical justification for the revised upgradient concentration. Once DNRE has verified that the approved sampling protocol was followed for sample

collection and analysis, that the report accurately reflects the sampling data as previously reported to DNRE by BEF and that the revised upgradient concentration calculation was performed as set forth in this section 3.8, if the revised upgradient concentration is above 2.0 milligrams per liter, the revised upgradient concentration shall become the clean up criteria pursuant to R 299.5707. Any such revised background concentration shall be based on the arithmetic mean plus one standard deviation of the average concentration from each upgradient groundwater monitoring well. The average concentration for each upgradient groundwater monitoring well shall be calculated using the arithmetic mean of all groundwater sampling results for each well.

---

#### **IV. DNRE APPROVAL OF SUBMITTALS**

- 4.1 For any work plan, proposal, or other document that is required by this Consent Order to be submitted to the DNRE by BEF, the following process and terms of approval shall apply.
- 4.2 All work plans, proposals, and other documents required to be submitted by this Consent Order shall include all of the information required by the applicable statute and/or rule, and all of the information required by the applicable paragraph(s) of this Consent Order.
- 4.3 In the event the DNRE disapproves the work plan, proposal, or other document, it will notify BEF, in writing, specifying the reasons for such disapproval. BEF shall submit, within 30 days of receipt of such disapproval, a revised work plan, proposal, or other document which adequately addresses the reasons for the DNRE's disapproval. If the revised work plan, proposal, or other document is still not acceptable to the DNRE, the DNRE will notify BEF of this disapproval. The DNRE will contact BEF to discuss deficiencies in the work plan, proposal or other document prior to sending a written disapproval under this paragraph.
- 4.4 In the event the DNRE approves with specific modifications, a work plan, proposal, or other document, it will notify BEF, in writing, specifying the modifications required to be made to such work plan, proposal, or other document prior to its implementation and the specific reasons for such modifications. The DNRE may require BEF to submit, prior to implementation and within 30 days of receipt of such approval with specific modifications,

a revised work plan, proposal, or other document which adequately addresses such modifications. If the revised work plan, proposal, or other document is still not acceptable to the DNRE, the DNRE will notify BEF of this disapproval.

- 4.5 Upon DNRE approval, or approval with modifications, of a work plan, proposal, or other document, such work plan, proposal, or other document shall be incorporated by reference into this Consent Order and shall be enforceable in accordance with the provisions of this Consent Order.
- 4.6 Failure by BEF to submit an approvable work plan, proposal, or other document, within the applicable time periods specified above, constitutes a violation of this Consent Order and shall subject BEF to the enforcement provisions of this Consent Order, including the stipulated penalty provisions specified in paragraphs 9.2 and 9.3.
- 4.7 Any delays caused by BEF's failure to submit an approvable work plan, proposal, or other document when due shall in no way affect or alter BEF's responsibility to comply with any other deadline(s) specified in this Consent Order.
- 4.8 No informal advice, guidance, suggestions, or comments by the DNRE regarding reports, work plans, plans, specifications, schedules or any other writing submitted by BEF will be construed as relieving BEF of its obligation to obtain written approval, if and when required by this Consent Order.

## **V. EXTENSIONS**

- 5.1 BEF and the DNRE agree that the DNRE may grant BEF a reasonable extension of the specified deadlines set forth in this Consent Order. Any extension shall be preceded by a written request in duplicate to the DNRE, WB, Enforcement Unit Chief, Constitution Hall, 525 West Allegan Street, Lansing, Michigan 48909-7773, and the Kalamazoo District Supervisor at the address in paragraph 3.7, no later than ten business days prior to the pertinent deadline, and shall include:
- a. Identification of the specific deadline(s) of this Consent Order that will not be met.

- b. A detailed description of the circumstances that will prevent BEF from meeting the deadline(s).
- c. A description of the measures BEF has taken and/or intends to take to meet the required deadline.
- d. The length of the extension requested and the specific date on which the obligation will be met.

The district supervisor, in consultation with the Enforcement Unit Chief, shall respond in writing to such requests. No change or modification to this Consent Order shall be valid unless in writing from the DNRE, and if applicable, signed by both parties.

---

#### **VI. REPORTING**

- 6.1 BEF shall verbally report any violation(s) of the terms and conditions of this Consent Order to the Kalamazoo District Supervisor by no later than the close of the next business day following detection of such violation(s) and shall follow such notification with a written report within five business days following detection of such violation(s). The written report shall include a detailed description of the violation(s), as well as a description of any actions proposed or taken to correct the violation(s). BEF shall report any anticipated violation(s) of this Consent Order to the above-referenced individual in advance of the relevant deadlines whenever possible.

#### **VII. RETENTION OF RECORDS**

- 7.1 Upon request by an authorized representative of the DNRE, BEF shall make available to the DNRE all records, plans, logs, and other documents required to be maintained under this Consent Order or pursuant to Part 31 or its rules. All such documents shall be retained by BEF for at least a period of three years from the date of generation of the record unless a longer period of record retention is required by Part 31 or its rules.

#### **VIII. RIGHT OF ENTRY**

- 8.1 BEF shall allow any authorized representative or contractor of the DNRE, upon presentation of proper credentials, to enter upon the premises of the facility at all

reasonable times for the purpose of monitoring compliance with the provisions of this Consent Order. This paragraph in no way limits the authority of the DNRE to conduct tests and inspections pursuant to the NREPA and the rules promulgated thereunder, or any other applicable statutory provision.

#### IX. PENALTIES

- 9.1 BEF agrees to pay to the State of Michigan **\$10,000 DOLLARS** as compensation for the DNRE's cost of investigations and enforcement activities arising from the alleged violations specified in Section II of this Consent Order. Payment shall be made within 30 days of the effective date of this Consent Order in accordance with paragraph 9.6.
- 9.2 For each failure to comply with a specific deadline contained in paragraphs 3.2.c, 3.2.d, 3.3.b, 3.4, 3.5, 3.6.b, or Section IV of this Consent Order, BEF shall pay stipulated penalties of **\$5,000**. If, after 30 days from the original deadline, BEF has not fully corrected the violation, stipulated penalties shall begin to accrue at a rate of **\$300** per violation per day.
- 9.3 For each failure to comply with any other requirement of this Consent Order, BEF shall pay stipulated penalties of **\$200** per violation per day for each day of violation.
- 9.4 Stipulated penalties accruing under paragraphs 9.2 or 9.3 shall be paid within 30 days after written demand by the DNRE in accordance with paragraph 9.6.
- 9.5 To ensure timely payment of the above costs, and stipulated penalties, BEF shall pay an interest penalty to the General Fund of the State of Michigan each time it fails to make a complete or timely payment. This interest penalty shall be based on the rate set forth at MCL 600.6013(8), using the full increment of amount due as principal, and calculated from the due date for the payment until the delinquent payment is finally made in full.
- 9.6 BEF agrees to pay all funds due pursuant to this agreement by check made payable to the State of Michigan and delivered to the DNRE, Revenue Control Unit, P.O. Box 30657, Lansing, Michigan 48909-8157. To ensure proper credit, all payments made pursuant to this Consent Order must include the **Payment Identification No. WTR-2025**.

- 9.7 BEF agrees not to contest the legality of the costs paid pursuant to paragraph 9.1, above. BEF further agrees not to contest the legality of any stipulated penalties or interest penalties assessed pursuant to paragraphs 9.2, 9.3, and 9.5, above, but reserves the right to dispute the factual basis upon which a demand by the DNRE for stipulated penalties or interest penalties is made.

#### **X. FORCE MAJEURE**

- 10.1 BEF shall perform the requirements of this Consent Order within the time limits established herein, ~~unless performance is prevented or delayed by events that constitute~~ a "Force Majeure." Any delay in the performance attributable to a "Force Majeure" shall not be deemed a violation of BEF's obligations under this Consent Order in accordance with this section.
- 10.2 For the purpose of this Consent Order, "Force Majeure" means an occurrence or nonoccurrence arising from causes not foreseeable, beyond the control of, and without the fault of BEF, such as: an Act of God, untimely review of permit applications or submissions by the DNRE or other applicable authority, and acts or omissions of third parties that could not have been avoided or overcome by BEF's diligence and that delay the performance of an obligation under this Consent Order. "Force Majeure" does not include, among other things, unanticipated or increased costs, changed financial circumstances, or failure to obtain a permit or license as a result of BEF's actions or omissions.
- 10.3 BEF shall notify the DNRE, by telephone, within 48 hours of discovering any event that causes a delay in its compliance with any provision of this Consent Order. Verbal notice shall be followed by written notice within ten calendar days and shall describe, in detail, the anticipated length of delay, the precise cause or causes of delay, the measures taken by BEF to prevent or minimize the delay, and the timetable by which those measures shall be implemented. BEF shall adopt all reasonable measures to avoid or minimize any such delay.

- 10.4 Failure of BEF to comply with the notice requirements and time provisions under paragraph 10.3 shall render this Section X void and of no force and effect as to the particular incident involved. The DNRE may, at its sole discretion and in appropriate circumstances, waive in writing the notice requirements of paragraph 10.3, above.
- 10.5 If the parties agree that the delay or anticipated delay was beyond the control of BEF, this may be so stipulated, and the parties to this Consent Order may agree upon an appropriate modification of this Consent Order. However, the DNRE is the final decision-maker on whether or not the matter at issue constitutes a force majeure. The parties to this Consent Order understand and agree that the final decision by the DNRE regarding a force majeure claim is not subject to judicial review. The burden of proving that any delay was beyond the reasonable control of BEF, and that all the requirements of this Section X have been met by BEF, rests with BEF.
- 10.6 An extension of one compliance date based upon a particular incident does not necessarily mean that BEF qualifies for an extension of a subsequent compliance date without providing proof regarding each incremental step or other requirement for which an extension is sought.

#### **XI. GENERAL PROVISIONS**

- 11.1 With respect to any violations not specifically addressed and resolved by this Consent Order, the DNRE reserves the right to pursue any other remedies to which it is entitled for any failure on the part of BEF to comply with the requirements of the NREPA and its rules.
- 11.2 The DNRE and BEF consent to enforcement of this Consent Order in the same manner and by the same procedures for all final orders entered pursuant to Part 31, MCL 324.3101 et seq. and Part 201, MCL 324.20101, et seq.; and enforcement pursuant to Part 17, Michigan Environmental Protection Act, of the NREPA, MCL 324.1701 et seq.
- 11.3 This Consent Order in no way affects BEF's responsibility to comply with any other applicable state, federal, or local laws or regulations.

- 11.4 The WB reserves its right to pursue appropriate action, including injunctive relief to enforce the provisions of this Consent Order, and at its discretion, may also seek stipulated fines or statutory fines for any violation of this Consent Order. However, the WB is precluded from seeking both a stipulated fine under this Consent Order and a statutory fine for the same violation.
- 11.5 Nothing in this Consent Order is or shall be considered to affect any liability BEF may have for natural resource damages caused by BEF's ownership and/or operation of the facility. The State of Michigan does not waive any rights to bring an appropriate action to recover such damages to the natural resources.
- 
- 11.6 In the event BEF sells or transfers the facility, it shall advise any purchaser or transferee of the existence of this Consent Order in connection with such sale or transfer so long as this Consent Order remains in effect. Within 30 calendar days, BEF shall also notify the WB Kalamazoo District Supervisor, in writing, of such sale or transfer, the identity and address of any purchaser or transferee, and confirm the fact that notice of this Consent Order has been given to the purchaser and/or transferee. The purchaser and/or transferee of this Consent Order must agree, in writing, to assume all of the obligations of this Consent Order. A copy of that agreement shall be forwarded to the WB Kalamazoo District Supervisor within 30 days of assuming the obligations of this Consent Order.
- 11.7 The provisions of this Consent Order shall apply to and be binding upon the parties to this action, and their successors and assigns.
- 11.8 This Consent Order constitutes a civil settlement and satisfaction as to the resolution of the alleged violations specifically addressed herein; however, it does not resolve any criminal action that may result from these same alleged violations.

## XII. TERMINATION

12.1 This Consent Order shall remain in full force and effect until terminated by a written Termination Notice (TN) issued by the DNRE. Prior to issuance of a written TN, BEF shall submit a request consisting of a written certification that BEF has fully complied with the requirements of this Consent Order and has made payment of any fines, including stipulated penalties, required in this Consent Order. Specifically, this certification shall include:

- a. The date of compliance with each provision of the compliance program in Section III, and the date any fines or penalties were paid.
- b. A statement that all required information has been reported to the district supervisor.
- c. Confirmation that all records required to be maintained pursuant to this Consent Order are being maintained at the facility.

The DNRE may also request additional relevant information. The DNRE shall not unreasonably withhold issuance of a TN.

**Signatories**

The undersigned CERTIFY they are fully authorized by the party they represent to enter into this Consent Order to comply by consent and to EXECUTE and LEGALLY BIND that party to it.

**DEPARTMENT OF NATURAL RESOURCES AND ENVIRONMENT**

  
\_\_\_\_\_  
Rebecca A. Humphries, Director  
Department of Natural Resources and Environment

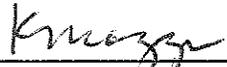
7/20/10  
Date

**DEPARTMENT OF ATTORNEY GENERAL**

\_\_\_\_\_  
By: Alan F. Hoffman, Assistant Attorney General  
For: S. Peter Manning, Chief  
Environment, Natural Resources, and Agriculture Division  
Michigan Department of Attorney General

\_\_\_\_\_  
Date

**BIRDS EYE FOODS, LLC**

  
\_\_\_\_\_  
By: Kelley Messis  
SVP

Title:  
7/7/10  
Date

**Signatories**

The undersigned CERTIFY they are fully authorized by the party they represent to enter into this Consent Order to comply by consent and to EXECUTE and LEGALLY BIND that party to it.

**DEPARTMENT OF NATURAL RESOURCES AND ENVIRONMENT**

\_\_\_\_\_  
Rebecca A. Humphries, Director  
Department of Natural Resources and Environment

\_\_\_\_\_  
Date

**DEPARTMENT OF ATTORNEY GENERAL**

\_\_\_\_\_  
By: Alan F. Hoffman, Assistant Attorney General  
For: S. Peter Manning, Chief  
Environment, Natural Resources, and Agriculture Division  
Michigan Department of Attorney General

7/16/10  
Date

**BIRDS EYE FOODS, LLC**

\_\_\_\_\_  
By: *Kuoyz*

\_\_\_\_\_  
Title: *SVP*

7/7/10  
Date



**ACO-000017 Exhibit A**  
**Private Water Supply Well Owners -**  
**BEF Supplying Bottled Water as of March 24, 2010**

House Number	Street Address	Well ID/Owner
<b>Private Water Supply Wells - Howard Street</b>		
2381	Howard Street	Barrera, Francisco (Prev. Owner - J. Alvarez)
<b>Private Water Supply Wells - Retreat Road</b>		
2411	Retreat Road	Ries, Barbara
<b>Private Water Supply Wells - 54th Street</b>		
2423	54th Street	George, Tami
2371	54th Street	Dekker, John
2354	54th Street	Jonio, Kevin (see Note 1.)
2342	54th Street	Rodriguez, Juan
2334	54th Street	Martinez, Daniel
2322	54th Street	Delgado, Martin (Prev. owner - L. Pena)
2313	54th Street	Guerra, Joel (Prev. owner - J. Bradford)
2275	54th Street	Paridee, Charlotte
2267	54th Street	Reyes, Fernando
2258	54th Street	Mendoza, Pedro
2254	54th Street	Mendoza, Carlos
2253	54th Street	Martinez, Diana
<b>Private Water Supply Wells - 55th Street</b>		
2381	55th Street	Moore
2377	55th Street	Neldon, Charles
2376	55th Street	Hicks, Clifton
2374	55th Street	Diaz, Yolanda & Jose Fernandez
2372	55th Street	Diaz, Yolanda & Jose Fernandez
2370	55th Street	Bennett, Diana
2367	55th Street	Hicks, Deana
2363	55th Street	Stam, Leon (Jane Jacobson)
2360	55th Street	Gonzales, Maria
2359	55th Street	Lozar, Randy
2355	55th Street	Hanson, Terry
2350	55th Street	Gemeinhardt, Paul (Prev. Owner - Janis Reed & Dennis Carroll)
2342	55th Street	Nauta, David
2293	55th Street	Saylor, Darcy and Jason (Prev. Owner - Larry Saylor)
2291	55th Street	Gilbert, Larry
2286	55th Street	Ensing, Brian
2244	55th Street	Salazar, Wendy (Prev. Owners - Rhonda Barnes; Jesus Salazar)
2240	55th Street	O' Connor, Robert (Prev. Owner - Ameriquet Mortgage)
2235	55th Street	Alvarez, Santos (Prev. Owner - Frank Gonzales)
2230	55th Street	Martin, Roger
<b>Private Water Supply Wells - 124th Avenue</b>		
5584	124th Avenue	Laaksonen, Leonard
5576	124th Avenue	Salinas, Romero
5567	124th Avenue	Giles, Jackie
5552	124th Avenue	Johnson, Jim
5522	124th Avenue	Veldhoff, Dylan and Bonnie
5514	124th Avenue	Adams, Scott
<b>Private Water Supply Wells - 124th Avenue</b>		
5458	124th Avenue	Fennville Baptist Church
5456	124th Avenue	Martin, Stephen
5449	124th Avenue	Nolan, Christopher
5448	124th Avenue	Knight, Howard
5444	124th Avenue	Moreno, Nydia (Prev. owner - Lois & Ranny Graves)
5430	124th Avenue	Craton, Kari & Ron
5382	124th Avenue	Martin, Frances

**ACO-000017 Exhibit A**  
**Private Water Supply Well Owners -**  
**BEF Supplying Bottled Water as of March 24, 2010**

House Number	Street Address	Well ID/Owner
5381	124th Avenue	Sharp, Danny
5362	124th Avenue	Lopez, Maria
5356	124th Avenue	Schut, Joe
5337	124th Avenue	Allegan County

Note:

1. Bottled water no longer supplied since the house is vacant.

ACO-000017 EXHIBIT B: Properties BEF to Pay for Connections to the Fennville Water Supply System Under Paragraph 3.3(b)

	A	B	C
	House Number	Street Address	Well ID/ Owner
1			
2	2438	Orchard Valley	Morgan, Joyce & Anthony
3	2385	Howard Street	Druam, Sarah (Owner - Francisco Barrera)
4	2381	Howard Street	Barrera, Francisco (Prev. Owner - J. Alvarez)
5	2488	54th Street	Lopez, Elisa
6	2423	54th Street	George, Tami
7	2415	54th Street	Hunter, Mary
8	2380	54th Street	Ortiz, Mary & Robert
9	2370	54th Street	Guerra, Lazaro
10	2268	54th Street	Streicher, Royal
11	2254	54th Street	Mendoza, Carlos
12	2258	54th Street	Mendoza, Pedro
13	2322	54th Street	Delgado, Martin (Prev. Owner - L. Pena)
14	2334	54th Street	Martinez, Daniel
15	2342	54th Street	Rodriguez, Juan
16	2354	54th Street	Jonio, Kevin
17	2419	55th Street	Stennett, Timothy & Linda
18	2415	55th Street	Reyes, Ramiro & Rana (Prev. Owner - Michael Wallace)
19	2390	55th Street	Bustillos, Sonny
20	2382	55th Street	Clauser, Sylvester
21	2381	55th Street	Moore
22	2377	55th Street	Neldon, Charles
23	2376	55th Street	Hicks, Clifton
24	2372	55th Street	Diaz, Yolanda & Jose Fernandez
25	2370	55th Street	Bennett, Diana
26	2367	55th Street	Hicks, Deana
27	2363	55th Street	Stam, Leon (Jane Jacobson)
28	2359	55th Street	Lozar, Randy
29	2356	55th Street	Gonzales, Maria
30	2355	55th Street	Hnason, Terry
31	2350	55th Street	Gemeinhardt, Paul (Prev. Owner - Reed Janis & Dennis Carroll)
32	2342	55th Street	Nauta, David
33	2293	55th Street	Saylor, Larry
34	2291	55th Street	Gilbert, Larry
35	2286	55th Street	Ensing, Brian
36	2244	55th Street	Barnes, Rhonda (Prev. Owner - Jesus Salazar)
37	2240	55th Street	O'Connor, Robert (Prev. Owner - Ameriquet Mortgage)
38	2235	55th Street	Alvarez, Santos (Prev. Owner - Frank Gonzales)
39	2230	55th Street	Martin, Roger
40	2287	57th Street	Smith, Allen
41	2275	57th Street	Gonzales, Sixto
42	5597	122nd Street	Hyde, David
43	5588	124th Avenue	D. Wood

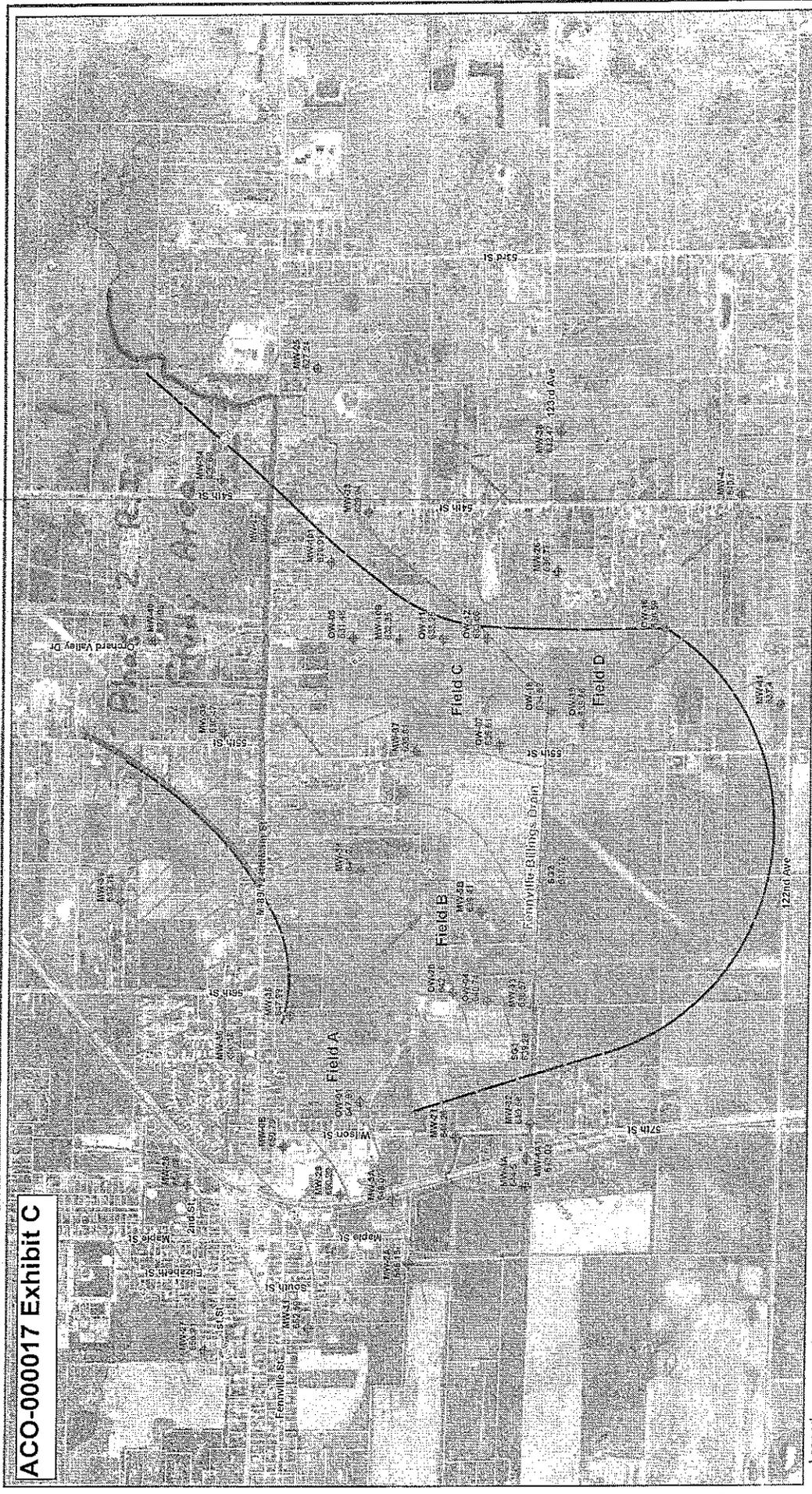
ACO-000017 EXHIBIT B: Properties BEF to Pay for Connections to the Fennville Water Supply System Under Paragraph 3.3(b)

	A	B	C
44	5584	124th Avenue	Laaksonen, Leonard
45	5580	124th Avenue	Bushee, Robert
46	5576	124th Avenue	Salinas, Romero
47	5570	124th Avenue	Martinez, Raul
48	5569	124th Avenue	Wells, Theo
49	5567	124th Avenue	Giles, Jackie
50	5565	124th Avenue	Mix-Dean, Brian
51	5561	124th Avenue	Barnes, Kerry
52	5556	124th Avenue	Ramirez, Joe
53	5552	124th Avenue	Johnson, Jim
54	5541	124th Avenue	DeJonge, John
55	5539	124th Avenue	Baker, Doug
56	5538	124th Avenue	Gonzales, Robert
57	5537	124th Avenue	Gardea, San Juana
58	5536	124th Avenue	H, Tighe
59	5535	124th Avenue	Scholten, Stacy
60	5528	124th Avenue	Marquez, Mahala
61	5522	124th Avenue	Veldhoff, Dylan & Bonnie
62	5517	124th Avenue	Aguilar, Adam
63	5516	124th Avenue	Brooks, Dawn (Prev. Owner - James Long)
64	5515	124th Avenue	Aguilar, George
65	5514	124th Avenue	Adams, Scott
66	5476	124th Avenue	Onken, Ronald
67	5475	124th Avenue	Grostick, Karen
68	5473	124th Avenue	Henry, Dorothy
69	5472	124th Avenue	Ostema, Christopher (Prev. Owner - Edward Jalovec)
70	5471	124th Avenue	Stennett, Larry
71	5469	124th Avenue	McCracken, Robert
72	5468	124th Avenue	Atkins, John
73	5467	124th Avenue	Slotman, Robert
74	5466	124th Avenue	Barrera, Francisco
75	5465	124th Avenue	Killgore, Lois
76	5464	124th Avenue	Cordova, Francisco
77	5463	124th Avenue	Earl, James
78	5461	124th Avenue	Jerbacio, Felipe
79	5459	124th Avenue	Diaz, Felipa
80	5458	124th Avenue	Fennville Baptist Church
81	5456	124th Avenue	Martin, Stephen
82	5449	124th Avenue	Nolan, Christopher
83	5448	124th Avenue	Knight, Howard
84	5447	124th Avenue	Sabin, Ron
85	5446	124th Avenue	Graves, Ranny (Lois)
86	5444	124th Avenue	Moreno, Nydia (Prev. Owner - Lois & Ranny Graves)

ACO-000017 EXHIBIT B: Properties BEF to Pay for Connections to the Fennville Water Supply System Under Paragraph 3.3(b)

	A	B	C
87	5443	124th Avenue	Cook, Joel & Christine
88	5438	124th Avenue	Weiland, Kenneth
89	5436	124th Avenue	King, Pauline
90	5430	124th Avenue	Craton, Kari & Ron (old well data /new well data)
91	5424	124th Avenue	Avalos, Maricruz
92	5382	124th Avenue	Marin, Frances
93	5381	124th Avenue	Sharp, Danny
94	5375	124th Avenue	Wright, Dan (Prev. Owner - R. Demaray)
95	5371	124th Avenue	Rosas, Juan (Prev. Owner - Deutsche Bank)
96	5362	124th Avenue	Lopez, Maria
97	5356	124th Avenue	Schut, Joe
98	5342	124th Avenue	Sessions, Brian

# ACO-000017 Exhibit C



**Legend**

- MW-21 Groundwater Monitoring Well and Water Elevation
- SG-1 Stream Gauge and Water Elevation
- CG-20 Groundwater Contour (2 Contour Interval)
- FA-2010 Approximate Area Downgradient of Spray Fields February, 2010
- FD-2010 Groundwater Flow Direction

**Notes:**

- Quantitative contour positions using ESRI ArcGIS 9.3 Spatial Analyst. Registered spline interpolation method was used with a weight of 0.1 and 10 points used in the calculation of each interpolated cell.

**Source:**  
Parcel data and 2010 orthophoto from Allegan County GIS.

This drawing is neither a legally recorded map nor an accuracy and is not intended to be used as one. This drawing is a compilation of reports, information and data used for reference purposes only.

**BIRDS EYE FOODS, LLC**

**FIGURE 2**

**GROUNDWATER CONTOUR MAP**

**FEBRUARY 24, 2010**

**FENNVILLE, MI**

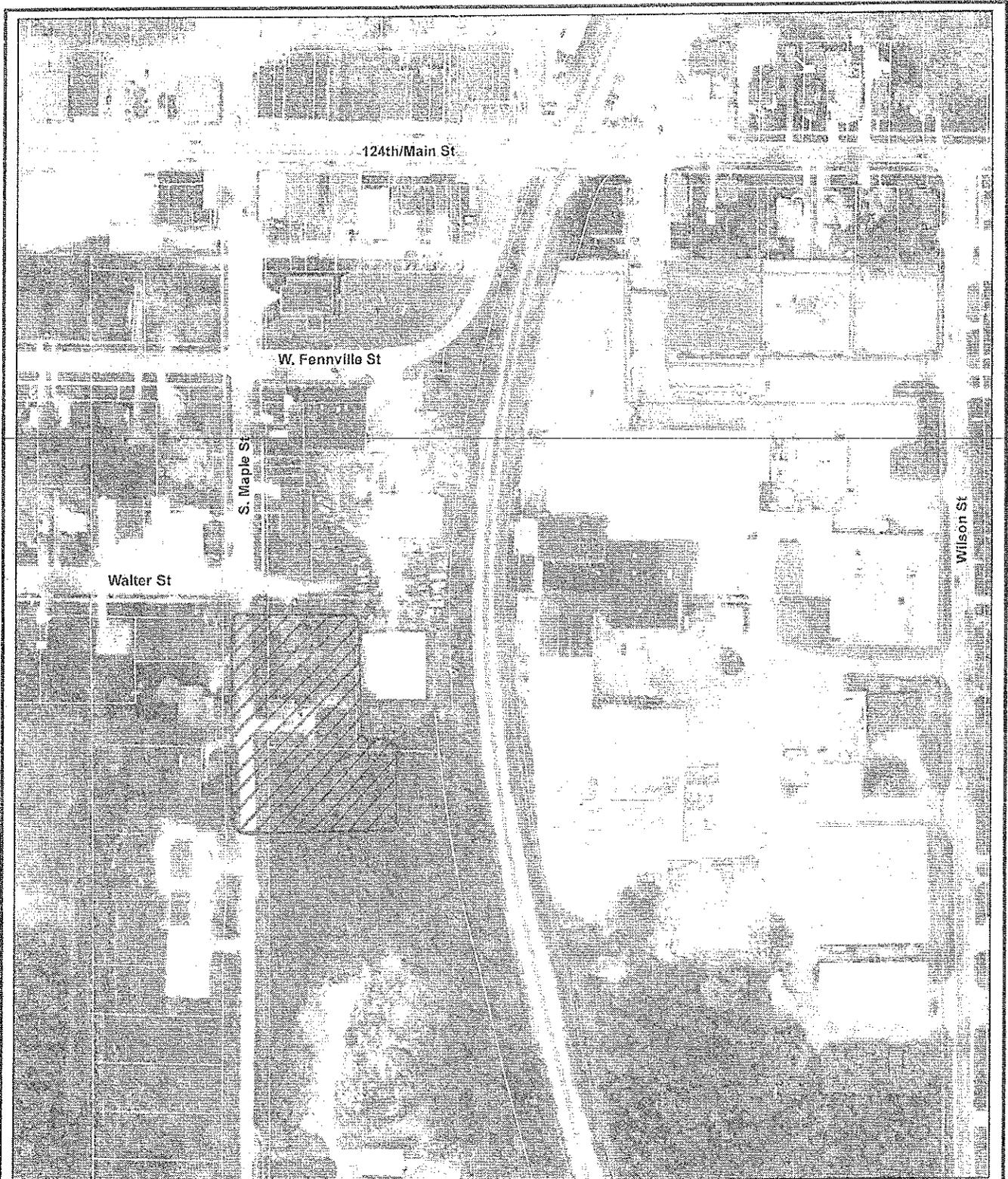
Scale: 1" = 200'

Drawn By: BUW1

Checked By: REB4

Date: MAY, 2010

Scope: 06R002



**Legend**

-  Birds Eye Property Boundary
-  Parcels



DNRE approved location for MW-43

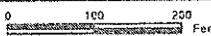


Source:  
Parcel data and 2004 orthophoto  
from Allegan County LIS.



BIRDS EYE FOODS, LLC

**FIGURE 1**  
PROPOSED UPGRADIENT GROUNDWATER  
MONITORING WELL LOCATION  
FENNVILLE, MI

Scale:  Feet

Date: MAY, 2010

Drawn By: BJW1

Checked By: REM

Scope: 09B002